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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No. 09-100

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

RAYMOND DESHA DAVIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS

I.

The test for "custody" for *Miranda* warnings is not whether a reasonable person would believe that he was not free to leave, but rather whether the individual's freedom of action is curtailed to a "degree associated with formal arrest," and so *Miranda* warnings are not required at routine traffic stops or *Terry* stops. *Michigan v. Summers* permits the temporary detention of persons on the premises during the execution of a search warrant to ensure the full and safe execution of the warrant. Must *Miranda* warnings be given before any person so detained may be asked even the most cursory of questions?

II.

Pennsylvania v. Muniz and *New York v. Quarles* seemingly allow the police to ask arrestees questions that elicit incriminating answers—without giving the *Miranda* warnings—so long as the questions also have valid safety or administrative justifications. Without giving *Miranda*, the police asked a group of search-warrant detainees "who lives here?" because they wanted to know if any other persons, dangerous animals, or weapons were present, and whom to give the return to; but they also used respondent's affirmative answer to connect him to the drugs. Did the Michigan state courts erroneously exclude respondent's answer because he was not first mirandized?

III.

Under *Missouri v. Seibert*, the police may continue questioning a suspect even after they have improperly obtained an un-mirandized confession from him, as long as they properly give him the warnings and do not leverage the first statement to obtain the second. After respondent admitted he resided in the drug house, officers gave him the *Miranda* warnings, and he then confessed that some of the drugs were his. Does *Seibert* require suppression of the mirandized statement?

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NOW COMES the State of Michigan, by KYM L. WORTHY, *Prosecuting Attorney for the County of Wayne*, TIMOTHY A. BAUGHMAN, *Chief of Research, Training, and Appeals*, and DAVID A. MCCREEDY, *Assistant Prosecuting Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on December 18, 2008, leave denied by the Michigan Supreme Court on May 1, 2009.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in a criminal case to be a witness against himself . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Detroit Police Officers executing a narcotics search warrant found respondent, along with drugs and guns, in the targeted home. After admitting that he lived there and that at least the marijuana was his, respondent was charged with possession of ecstasy, possession of a firearm by a felon, possession with intent to deliver marijuana, possession of a firearm during the commission of a felony, and with being an habitual third offender. In the trial court, respondent filed a motion to suppress the two statements he made while in the house admitting that he lived there and that the marijuana belonged to him.

Detroit Police Officer Robert Gadwell was the only person to testify at the ensuing evidentiary hearing. He stated that on September 13, 2006, he and other Detroit Police officers executed a narcotics search warrant at 20416 Hull Street in the City of Detroit. (EH, 3-4). As Officer Gadwell entered the house, he saw three individuals in the living room area. (EH, 4). He secured them while the other officers cleared the house. Eventually, respondent was brought into the living room by other officers after having tried to escape by jumping out of a bedroom window. (EH, 6, 16). All the individuals, including respondent, were handcuffed so that the men could not harm the officers or each other. They were told that they were just being detained; Gadwell reiterated at the hearing that they were not under arrest. (EH, 7). Shortly thereafter, Officer Gadwell and other officers started obtaining "basic information" from those individuals, including names, addresses, and birth dates. (EH, 8-9). This is standard procedure at every drug raid. (EH, 11).

Sometime during this process, Gadwell asked if any of them lived there, and respondent said that

he did. (EH, 12). According to Gadwell, the house was still being cleared and he wanted to know if there were others on the premises and whether there might be any animals that would surprise the officers. (EH, 12). And, it was helpful to know who lived there in order to give that person a copy of the search warrant and the return listing all the items seized. (EH, 13). Further, as Gadwell acknowledged on cross-examination, sometimes knowing that a particular person lives in a drug house helps connect them to the recovered narcotics, but the owner is not always the seller, and so other times residency information is not used as evidence. (EH, 47-48). Gadwell estimated that it took half an hour to complete the processing of these four individuals. (EH, 15).

Once the house was cleared, Gadwell told the other officers that respondent lived there, and they in turn informed him that they had found narcotics and guns in the back bedroom from which respondent had initially tried to flee. As a result, the other three persons were ticketed and released, but respondent was arrested. (EH, 15).

As Gadwell led Davis to the back bedroom for questioning, he advised him of his *Miranda* rights. (EH, 16). Gadwell then removed respondent's handcuffs (EH, 17) and had him read out loud the Detroit Police Constitutional Rights Form. (EH, 19). Although Gadwell gave Davis the opportunity to initial each right and to sign the form, respondent refused. (EH, 22). Gadwell then indicated on the form that respondent had his rights explained to him, that he agreed to make a voluntary statement, and that he refused to sign the certificate. (EH, 23). According to Gadwell, it is not uncommon for a suspect to be willing to make a statement but to refuse to sign any paperwork. (EH, 62).

Gadwell then turned to the "Interrogation Record" portion of the form, and again read

respondent his rights. (EH, 26). Gadwell assured Davis that he could stop at any time (EH, 26), then began asking questions to fill out respondent's in-depth personal information, such as his name, nicknames, birth date, address, height, weight, whether he wore glasses, whether he had any tattoos, how long he had resided in the City of Detroit, et cetera. (EH, 27-30). Davis responded to all the proffered questions, including, again, that his address was 20416 Hull. (EH, 28).

After the Interrogation Record was complete, Gadwell asked respondent about the circumstances of the crime, and Gadwell wrote down his questions and respondent's answers verbatim.

Q: Do you understand your rights?
A: Yes.
Q: What were you doing in this house?
A: Chilling. Playing a game.
Q: Why did you run when the police came?
A: I had some weed and I was scared.
Q: What were you going to do with the marijuana?
A: I don't want to say anything. (EH, 31-32).

Once Davis indicated that he no longer wanted to answer, Gadwell's questioning stopped. (EH, 34).

There was no other testimony offered at the hearing, and neither party introduced the transcript from respondent's preliminary examination into evidence.

Judge Carole Youngblood of the Third Circuit Court suppressed respondent's statements, holding that he was "in custody" and therefore required

Miranda warnings before being initially asked if he lived at the house; that the second, *mirandized* statement was tainted by the un*mirandized* first one; and that even if defendant could have validly waived his rights for the second statement, he did not in fact knowingly or voluntarily do so. In so holding, Judge Youngblood relied on alleged facts that were not part of the record. Namely, she believed that Officer Gadwell was not credible because his testimony at the evidentiary hearing was contradicted by fellow officers who testified at respondent's preliminary exam.

The Michigan Court of Appeals affirmed, holding that respondent "could reasonably believe that he was not free to leave" and therefore was "in custody" for *Miranda* purposes when he was first detained. Additionally, Gadwell should have known that his question about who lived there was likely to invoke an incriminating response, and thus it constituted "interrogation." Because respondent was both in custody and interrogated, his statement that he lived there was obtained in violation of his Fifth Amendment rights. Similarly, the second, mirandized statement was also correctly excluded, according to the appellate panel, essentially because the formal statement was fruit of the poisonous tree.

The Michigan Supreme Court denied leave to appeal on May 1, 2009.

REASONS FOR GRANTING THE WRIT

I. To clarify that *Summers* detainees are not entitled to *Miranda* warnings.

Together, three cases from this Court—*Michigan v. Summers*, 452 U.S. 692, (1981), *California v. Beheler*, 463 U.S. 1121 (1983), and *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)—hold that a subject's detention during the execution of a search warrant does not constitute "arrest" for *Miranda* purposes and, therefore, that he may be briefly questioned about his potential connection to the drugs without being advised of his Fifth Amendment rights. Since respondent here initially admitted that he lived at the dope house while *detained* but not *arrested*, his admission cannot be excluded by the *Miranda* doctrine. Certiorari should be granted both to clarify the holding of *Summers*, *Beheler*, and *Berkemer*, and to correct the Michigan state courts which declined to follow it.

According to the Court in *Beheler*, prophylactic warnings are only required when the subject has been *formally arrested* or has suffered a restraint on his freedom of movement *to the degree associated with a formal arrest*. This is because the *Miranda* notification is meant to protect persons suspected of crimes from the "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602, 1624 (1966). Thus, even though the *Beheler* Court recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be

charged with a crime," *Beheler,* 463 U.S. at 1124 (citation omitted), defendant Beheler was *not* "in custody" even when interviewed at the police station, because he was not forced to go there, was told he was not under arrest while there, and was allowed to go back home after the interview. *Id.* at 1122-23. In other words, police interrogations do not automatically require *Miranda* warnings: it is interrogation coupled with formal arrest, or its equivalent, that triggers the warning process.

Both the trial court and the Michigan Court of Appeals blithely posited that any time a suspect is "not free to leave," he is in custody for *Miranda* purposes. But in light of *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138 (1984), both courts should have known better. In *Berkemer,* this Court ruled that a driver whose car was pulled over could properly be questioned as to whether he was intoxicated—without being mirandized. *Id.* at 442. In other words, even though the suspect was clearly not free to leave, he was not "in custody" and thus was not entitled to the *Miranda* warnings before being questioned as to his possible criminal conduct. *Id.* Professor LaFave has stated the holding of *Berkemer* succinctly: the custody question under *Miranda* "is not whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with *formal arrest.*" LaFave et al., Crim. Proc. (2d ed. 1999), § 6.6(c), p. 526 (emphasis added). And, of course, the inquiry is an objective one, not based on the subjective views of either the officers or the subject being questioned. *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1529 (1994).

Respondent here was merely detained, with others, in the living room of his own house, which

falls far short of the degree of custody associated with formal arrest. In fact, in *Michigan v. Summers,* 452 U.S. 692 (1981), this Court specifically said that persons detained in their own home while the police execute a search warrant are, in the normal course, *not* under arrest. *Id.* at 702. In that case, the defendant was found coming out of his house as the police were entering to execute a search warrant. They detained him, brought him back into the house, and searched him, finding heroin. *Id.* at 693. The search was upheld even though lacking probable cause, because it was more akin to a *Terry* stop than a full-fledged arrest. In fact, according to *Summers* a search-warrant detention is *"substantially less intrusive than an arrest."* *Summers, supra,* at 702 (emphasis added, internal quotation marks omitted).

Correspondingly, this Court said in *Berkemer* that, during a *Terry* stop, officers "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer,* 468 U.S. at 439, 104 S.Ct. at 3138. In other words, in the Fourth Amendment search-and-seizure as in the Fifth Amendment self-incrimination context, there are different levels of detention, with different rules for each. Detaining a subject to the point of formal arrest requires probable cause, but lesser detentions only require a reasonable, articulable suspicion. And, these latter detentions do not require *Miranda* warnings before initially questioning the subject as to his identity and possible criminal involvement.

The unavoidable conclusion arising from *Summers, Berkemer,* and *Beheler* is that search-warrant detainees may be briefly questioned without being given *Miranda* warnings, similar to a *Terry* stop. And, although this Court has yet to directly

announce that rule of law, the U.S. Courts of Appeals for the Fifth, Seventh, and Tenth Circuits have all recognized that "in the usual case, a person detained during the execution of a search warrant is not 'in custody' for purposes of *Miranda*." *U.S. v. Burns*, 37 F.3d 276, 281 (CA 7, 1995). See also *U.S. v. Fike*, 82 F.3d 1315, 1324-26 (CA 5, 1996), overruled in part on other grounds, *U.S. v. Brown*, 161 F.3d 256, 259 n. 7 (CA 5, 1998); *U.S. v. Ritchie*, 35 F.3d 1477, 1485 (CA 10, 1994). Additionally, while the Ninth Circuit did not mention *Summers* directly, that court has also acknowledged that the police may ask a "moderate number" of questions of a search-warrant detainee—both to ascertain his identity and to confirm or dispel their suspicions about his connection to the drugs—without giving *Miranda*. *U.S. v. Davis*, 530 F.3d 1069, 1082 (2008).

Here, respondent was merely detained with other persons found in the house when Officer Gadwell asked a question of the group: who lives here? At that time, none of them was under arrest. In fact, the men were told they were just being detained; and, those not connected to the guns and drugs were released once the premises was secured. Although all the men were handcuffed for their own safety and that of the officers, they were not isolated in police cars or even taken to separate rooms within the house, let alone taken to the police station.

Further, there is no evidence that the detainees who did not admit to living there were pressed for a different answer. In other words, the questioning was neither pointed, intense, or protracted. None of the men was confronted with the drugs or gun that were later found and asked to explain them. To the contrary, from all appearances, the men's denials were taken at face value. Only because respondent claimed he lived there (and

because he had exited the bedroom where the police found the weapons and narcotics) was he eventually arrested. But up to that point he, like the others, was a *detainee* not entitled to *Miranda* warnings.

The trial court did not make a finding that respondent had been arrested, only that he was not free to leave. This may have been factually correct, but it is not legally controlling. Certiorari should be granted.

II. To ratify *Pennsylvania v. Muniz*'s implicit holding that an arrestee may be asked questions which have an objectively permissible administrative or safety-related purpose, even if the responses will likely also be incriminating.

The question—"who lives here?"—when asked of a group of detainees during the execution of a narcotics search warrant, has valid safety and administrative purposes, and so is not an "interrogation" under *Miranda*, even if the police reasonably know that the response could be incriminating and even if the detainees are "in custody." As the *Miranda* Court itself stated, police may engage in "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" without giving the prophylactic warnings. 384 U.S. at 477-478. "In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." *Id.*

But even more specifically, this Court has already indicated—in *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638 (1990)—that questions which prompt incriminating answers may still be asked pre-*Miranda* if they are reasonably related to

a proper administrative or safety purpose. In that case, Inocencio Muniz was arrested for drunk driving and transported to the police station. There, despite not being mirandized, he was asked his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. *Id.* at 585-86. All nine justices apparently agreed that the questions were intended, at least from Muniz's point of view, to elicit an incriminating response. *Id.* at 601, 606-07, 609. (Clearly, Justice Brennan's plurality opinion says this, as does Justice Marshall's dissent; Chief Justice Rehnquist's concurrence assumes it.)

Nevertheless, eight of the nine held that Muniz's incriminating responses (all but the sixth-birthday answer) were admissible. Justice Brennan's plurality found a "booking exception" to *Miranda*, while Justice Rehnquist believed that the incriminating nature of Muniz's responses was not testimonial (he demonstrated his intoxication by slurring his words, not by the content of his responses) and therefore admissible. *Id.* (Granted, Justice Brennan also contradicted himself in the same paragraph, first stating that the routine booking questions were intended to elicit an incriminating response but were still admissible because subject to an exception, and then finding them permissible because they were asked for record-keeping purposes only.) Thus, although *Muniz* has no majority reasoning, it should stand for this proposition: that where the police ask questions for valid non-investigatory purposes, the questions fall outside *Miranda* even if the police also know that the questions are reasonably likely to elicit an incriminating response.

Additionally, when the police have arrested a suspect, they may also ask safety-related

questions—without first giving the *Miranda* warnings—even though the responses may incriminate. See *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 2631-32 (1984). Thus, when the police reasonably believe that an arrestee has discarded a weapon, they may ask him where it is, even though a positive response will probably incriminate him. *Id.*

Here, asking "who lives here" was not an interrogation. Although whether respondent resided at the Hull address had some bearing on his criminal culpability, the question was asked of the group, for legitimate non-investigatory purposes. As Officer Gadwell indicated, it is helpful for police to know who else might be in the house, whether there are any animals present, and who to give the search warrant and return to. Thus, regardless what Gadwell's subjective intent was, this question objectively constitutes (a) a proper on-the-scene general question of citizens in the fact-finding process, (b) a proper "booking question" in the process of identifying the individuals present when the warrant was executed, and (c) a proper public safety question to protect the officers who were clearing the house. By simply being asked if he lived there, respondent was not being interrogated, and thus he was not entitled to *Miranda* warnings.

This Court should grant certiorari to better articulate this rule of law arising from *Muniz* and to correct the Michigan state courts' misapplication of it.

III. To correct the misunderstanding and misapplication of *Missouri v. Seibert*, and to clarify its 4-1-4 holding.

Even if respondent should have been mirandized before being asked where he lived, suppressing his voluntary statement, given *after* a proper reading and waiver of the rights, violated *Oregon v. Elstad*, 470 U.S. 298 (1985). *Elstad* authorizes the admission of a mirandized confession, even after the police initially fail to give the warnings and obtain an inculpatory statement. That is, the failure of officers to properly mirandize a suspect does not preclude admission of a later statement given after being apprised of those rights, unless officers (a) deliberately omitted giving the *Miranda* warnings in order to obtain an initial confession, (b) failed to take any corrective action to ensure that a reasonable person in the suspect's situation would understand the import and effect of the ensuing warnings, and then (c) used the informal statement as leverage in procuring a mirandized one. See *Missouri v. Seibert,* 542 U.S. 600, 124 S.Ct. 2601 (2004).

Here, Officer Gadwell did not intentionally omit Miranda when he asked who lives here. More importantly, once respondent was arrested, he was read his rights twice and stated that he understood them, and there is nothing in the record to suggest that these readings were rendered ineffectual simply because respondent had initially admitted that he resided at the drug house. Most tellingly, not only did Gadwell not use the informal admission as a fait accomplis to obtain respondent's formal statement that he lived there, but once he was read his rights, respondent admitted that some of the drugs were his. In other words, the formal statement did not relate

back to the un-mirandized one. Nevertheless, confusion over the reach of *Missouri v. Seibert* caused the Michigan state courts to erroneously suppress respondent's second statement. Both *Seibert* and *Elstad* require that the second statement be admitted.

In *Elstad*, the police arrested the defendant in his home and questioned him without *Miranda* warnings, and he admitted to participating in a robbery. 470 U.S. at 301. Elstad later gave a full confession at the police station after being mirandized. *Id.* at 301-02. Although the Court held that the first statement had to be suppressed, that did not prevent the introduction of the full confession. Only if the second statement had not been given knowingly and voluntarily would it be suppressed, but not on the basis of a failure to notify the defendant of his rights. *Id.* at 309. According to *Elstad*, where prior un-*Mirandized* custodial interrogation is not coercive, such questioning does not preclude the admission of a later mirandized statement. That is what happened here, and so the formal statement should have been admitted.

Judge Youngblood and the Michigan Court of Appeals seemed to believe, however, that *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004), rendered the mirandized confession inadmissible. This is wrong. In *Seibert*, the police arrested the defendant and took her to the police station. There, an officer questioned her for 30 to 40 minutes, intentionally withholding the *Miranda* warnings, while squeezing her arm and trying to make her feel guilty about the death she eventually admitted to causing. *Id.* at 604. After a brief break, the officer turned on a tape recorder, gave *Miranda*, and prompted Seibert to confess again. When she resisted, he reminded her that she had already told

him that the victim was supposed to die in his sleep. Seibert then formally admitted that she intended for the victim to die in the fire she had set. *Id.* at 605.

In a fractured opinion, this Court reversed. The four-justice plurality, led by Justice Souter, distinguished *Elstad* because, in Seibert's case, the initial police questioning was "systematic, exhaustive, and managed with psychological skill." *Id.* at 616. Moreover, the two statements totally overlapped in their content, were virtually continuous, and the interrogator even reminded Seibert during the second statement of what she had already confessed to in the first. In *Elstad*, on the other hand, given that the first confession occurred after only a short conversation at his home, a reasonable person could have seen the station house questioning as a new and distinct experience, and the *Miranda* warnings in that setting "could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.* at 615.

Justice Kennedy concurred that the mid-interrogation warning was insufficient, but rejected the plurality's test—whether the Miranda warnings delivered midstream could have been effective enough to accomplish their object—as too broad, given that it would apply even where the initial *Miranda* omission was unintentional. *Id.* at 621. Instead, Justice Kennedy indicated that post-*Miranda* statements may be excluded only when a *deliberate* two-step strategy was used *and* the postwarning statement is related to the substance of the prewarning statement, unless curative measures are taken before the postwarning statement is made. Thus, if *Miranda* was not deliberately omitted, if the second statement did not relate back to the first, or if curative measures were given to ensure that a reasonable person in the suspect's situation would

understand the import and effect of the *Miranda* warning (*id.* at 622), then the second statement would come in under Justice Kennedy's view. Because the police in *Seibert* acted intentionally, because the second statement totally related back to the first, and because any reasonable person would have questioned why *Miranda* was being given after they had just confessed, Justice Kennedy provided the fifth vote for reversal.

Under either analysis, however, respondent's formal statement here is admissible. The initial "interrogation"—a single question posed to a group of men, asked in respondent's living room—is about as far from a systematic, exhaustive, psychologically managed station-house interrogation as one can get. Additionally, there was a definite break between the two statements. When none of the other men claimed to live there, they were let go. Respondent was then formally arrested, taken to a different room, mirandized, and provided with a rights waiver form.

Further, respondent's second statement does not track the first at all. In fact, when asked formally what he was doing in the house, defendant did not say, "I live here" like he did when asked if anyone resided at the drug house. Instead, he said he was "chilling" and playing a game. Similarly, there is nothing to indicate that Gadwell reminded defendant of his earlier admission as a tactic in getting him to re-admit that he lived there or that the drugs were his. Clearly, as in *Elstad*, a reasonable person in respondent's shoes could have declined to talk pursuant to the subsequent warnings. Thus, even under Justice Souter's analysis, both Judge Youngblood and the Court of Appeals erred.

Under Justice Kennedy's view also, the second statement should not have been excluded. Even if, as

both courts below found, Gadwell's approach was disingenuous, the second statement did not relate back to the first and is thus admissible. This is especially true of the portion of the second statement where defendant admits he had some weed and ran because he was scared. Nothing of the sort was said in the initial conversation. Finally, even if the second statement did relate back to the first, the procedure Officer Gadwell followed would have demonstrated to a reasonable person in the suspect's situation that he did not have to speak. In fact, it had that very effect on respondent, because he ended the interview by stating that he no longer wished to say anything. There can hardly be more convincing evidence that a suspect was informed of, understands, and is able to exercise his rights than when he actually does so. This Court should grant certiorari not only to correct the mis-application of *Siebert*, but to clarify the holding of that case.

Here, defendant understood his rights and effectively waived them. He was given the *Miranda* warnings three times—once orally in the hallway, a second time when he personally read the advice of rights form out loud, and a third time during the completion of the Interrogation Record. Not only that, but the first interrogation question was whether he understood his rights, to which he answered, "yes." (EH, 31-32). He has never even claimed that he did not understand that he had the right to remain silent, the right to a lawyer, et cetera, or that he did not waive those rights.

Finally, contrary to Judge Youngblood's contention, defendant's confession is not rendered inadmissible simply because he refused to sign it or the waiver form, or because he may not have said "I hereby waive my rights." This Court has held that a defendant's refusal to sign a waiver form does not

mean that he did not properly waive his rights. See *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979). As Officer Gadwell testified, it is common for a suspect to willingly give a statement while refusing to sign any paperwork. Similarly, there are no magic words a suspect must recite before he can validly waive the rights enumerated by the *Miranda* warnings. To the contrary, a defendant may be *silent* as to whether he waives his rights, but as long as he understands them and engages in a course of conduct implicitly indicating waiver, then a court may properly conclude that the defendant has effectuated a waiver. *Id.* at 373, 1757. That is what happened here.

Conclusion

The federal courts seem confused about the extent to which a person detained under circumstances similar to those in *Terry*—such as during the execution of a search warrant—may be questioned without *Miranda* warnings. Cf. *U.S. v. Kim*, 292 F.3d 969, 976 (CA9 2002) (*Summers* detainee would be entitled to warnings); and *U.S. v. Davis*, 530 F.3d 1069, 1081-82 (CA9 2008) (proper to ask *Summers* detainee about drugs on premises, without warnings). Correspondingly, there is a difference of opinion as to whether an "arrest" under the Fourth Amendment is an "arrest" under the Fifth. Cf. *U.S. v. Bennett*, 329 F.3d 769, 774 (CA10 2003) (same test); with *U.S. v. Newton*, 369 F.3d 659, 673 (CA2 2004) (not same test). Apart from that, some courts persist in applying a "free to leave" standard to the "in-custody" question even after this Court has said that a detainee who is not free to leave still may not be in custody for *Miranda*

purposes. See *Kim*, *supra*, at 973-74; *U.S. v. Thompson*, 496 F.3d 807, 810-11 (CA7 2007); *U.S. v. Craighead*, 539 F.3d 1073, 1082 (CA9 2008). Moreover, even under the correct legal framework, courts cannot agree about what factors to use in deciding what constitutes the equivalent of formal arrest. See *U.S. v. Mittel-Carey*, 493 F.3d 36 (CA1 2007) (unfamiliar surroundings, many officers at the scene, physical restraint, and prolonged or intense interrogation); *Thompson*, *supra* (isolation, police show of force, detainee not told he was not under arrest).

Along these lines is this unresolved inquiry: what is the relationship, if any, between a subject's physical constraints and the type of questioning put to him? In other words, can the length and manner of the interrogation determine whether a person is "in custody," or do those factors matter only in deciding whether he has been "interrogated"? And even if a subject has been interrogated without *Miranda*, does *Muniz* allow his inculpatory answers to be admitted if the questions had valid non-investigatory purposes? It is evident from experience, and from the volume of cases in this area, that these questions arise frequently for law-enforcement officers and, subsequently, for courts. They deserve to be addressed by this Court.

Finally, as this case amply demonstrates, the tension between this Court's holdings in *Elstad* and *Seibert*, and the lack of a majority position in the latter case, have created an uncertain legal framework whenever the police initially fail to mirandize a suspect. Without a settled precedent, courts are left on their own to determine whether a subsequent statement is never, sometimes, or almost always admissible, and on what basis. As in

respondent's case, what results is an outcome-driven approach that is inconsistent with the rule of law. The test of admissibility in this area needs to be better refined and articulated.

For these reasons, this Court should grant certiorari.

RELIEF

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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Appendix A: Court of Appeals Opinion

COURT OF APPEALS OF MICHIGAN

PEOPLE of the State of Michigan,

Plaintiff-Appellant,

v.

Raymond Desha DAVIS,

Defendant-Appellee.

Docket No. 282886.

Dec. 18, 2008.

Wayne Circuit Court; LC No. 06-014376-01.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

PER CURIAM.

The prosecution appeals as on leave granted the trial court's order granting defendant's motion to suppress.[1] We affirm.

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[1]This Court initially denied leave "for failure to persuade the Court of the need for immediate appellate review." *People v Davis*, unpublished order of the Court of Appeals, entered February 22, 2008 (Docket No. 282886). The prosecution applied for leave to appeal with our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded this matter "for consideration as on leave

At issue are two statements defendant gave to police during a police raid on a residence in Detroit where the police were executing a search warrant. At the commencement of the raid, defendant jumped out of a back window and attempted to run away, only to be stopped and brought back into the house by an officer outside. Narcotics and firearms were found in the house. Defendant was placed in handcuffs, as were the three other people found in the house. Detroit Police Officer Robert Gadwell began obtaining the detainees' "names, birth dates, addresses" and social security numbers pursuant to "standard procedure," and he also asked the group "who lives here." Defendant volunteered that he did. After the residence was "cleared" by the officers, the three other detainees were issued "tickets" and released; defendant was placed under arrest. Defendant was then given his *Miranda*[2] warnings, which he indicated that he understood, and again asked various questions, including whether he lived at the residence. Defendant again stated that he did, and he furthermore explained that he ran from the police because he "had some weed and [he] was scared." The interview stopped when defendant stated that he "d[id]n't want to say anything" in response to an inquiry into what he planned to do with the marijuana.

The trial court held an evidentiary hearing regarding whether to suppress defendant's statements. The only individual to testify at the

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granted." *People v Davis*, 481 Mich 888; 749 NW2d 740 (2008).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

hearing was Officer Gadwell, but the trial court also considered the transcript from defendant's preliminary examination. The trial court held that defendant was in custody at all relevant times, so all of defendant's statements were in response to custodial interrogation. The trial court further found that an experienced narcotics officer would understand asking "who lives here" to be reasonably calculated to evoke an incriminating response for the purpose of establishing constructive possession, and it was "preposterous" to suggest otherwise. Therefore, it found that defendant's pre-*Miranda* response was inadmissible. The trial court further found Officer Gadwell to lack credibility when testimony from other officers at the preliminary investigation were considered, and it found that Officer Gadwell's reading of defendant's *Miranda* rights, followed by asking him again whether he lived here, constituted an impermissible attempt to retroactively "launder" an inadmissible statement. The trial court finally held that defendant's statement that he had weed was inadmissible because the prosecution failed to establish that defendant waived his rights.

We review a trial court's conclusions of law and application of the law to the facts regarding its decision to suppress a confession de novo, *People v McBride*, 273 Mich App 238, 249; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008), while reviewing its factual findings for clear error, *id.* A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake was made. *Id.*

Generally, a defendant's statements made during a "custodial interrogation" may not be

introduced into evidence unless the prosecution demonstrates that, prior to any questioning, the accused was read his *Miranda* rights, and voluntarily, knowingly and intelligently waived those rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). An accused is considered to be in "custody" if he could reasonably believe that he was not free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). The evidence established that, after defendant jumped out of a window and attempted to flee, he was brought back by police officers, handcuffed, and informed that he was being detained before he made his first statement. We conclude that, even though defendant was not formally under arrest until his later statements, he could reasonably have believed he was not free to leave. The trial court did not commit clear error in finding that defendant was in "custody" when he made his first challenged statement. *Zahn, supra* at 449.

Police conduct constitutes "interrogation" when the police knew or reasonably should have known that their conduct was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Conversely, "general on-the-scene questions" or "routine booking questions," such as asking for an individual's identity or address, are not always "designed to elicit incriminatory admissions," and thus, are not always considered "interrogation." See *Pennsylvania v Muniz*, 496 US 582, 600-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990); *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

Officer Gadwell testified that his questioning was purely administrative. However, we defer to the

trial court's assessment of a witness's credibility, and the trial court found Officer Gadwell not credible. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In addition, (1) the police were executing a search warrant for illegal narcotics, (2) defendant had just been detained after attempting to flee the residence, and (3) one of the two reasons given for defendant's subsequent arrest was because he admitted that he resided at the residence. We do not find that the trial court clearly erred in concluding, on the basis of the above circumstances, that Gadwell either knew or should have known that his question was likely to invoke an incriminating response, and thus, constituted "interrogation," *Anderson, supra* at 532-533. Accordingly, the trial court did not err when it granted defendant's motion to suppress his pre-*Miranda* statement. *Miranda, supra* at 444.

Defendant's second set of statements is a closer question. Defendant was unambiguously in custody at the time. Officer Gadwell testified that defendant was advised of his *Miranda* rights and that, although he refused to sign or write anything, defendant indicated that he understood those rights. Nevertheless, suppression is warranted if there is a "causal connection" between the first, improper statements and the subsequent statements given after a defendant is advised of his rights. See *People v Coomer*, 245 Mich App 206, 222; 627 NW2d 612 (2001). Defendant was arrested shortly after, and in part because of, defendant's statement that he lived at the residence; his second questioning occurred shortly after his arrest. We find that there was at least some causal connection between the two sets of statements.

Furthermore, we must again defer to the trial court's assessment of the credibility of witnesses before it. Where prior un-*Mirandized* custodial interrogation is not coercive, such questioning does not preclude the admission of a post-*Miranda* statement. *Oregon v Elstad*, 470 US 298, 308, 310-318; 105 S Ct 1285; 84 L Ed 2d 222 (1985). At the other extreme, a plurality[3] of the United States Supreme Court held that deliberately withholding *Miranda* warnings in order to obtain an unwarned confession for later use in obtaining the same information after giving warnings renders the subsequent statements inadmissible. *Missouri v Seibert*, 542 US 600, 600-602; 124 S Ct 2601; 159 L Ed 2d 643 (2004). The trial court's findings reflect a factual scenario somewhere in between, where Officer Gadwell's two-stage interview may not have been "systematic, exhaustive, and managed with psychological skill," *Seibert*, but it was, at a minimum, disingenuous.

When we consider the trial court's credibility assessment in conjunction with the causal connection between defendant's unwarned statement and his subsequent statements, and the fact that we "presume that a defendant did not waive his rights" unless the prosecution shows otherwise, *North Carolina v Butler*, 441 US 369, 373; 99 S Ct 1755; 60 L Ed 2d 286 (1979), we are not left with a definite and firm conviction that the trial court made a

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[3]A "plurality opinion of the Supreme Court, in which the reasoning is not supported by a majority of the justices, is not binding on this Court." *Jackson Drain Com'r v Village ofStockbridge*, 270 Mich App 273, 285; 717 NW2d 391 (2006).

mistake. We are therefore unable to find that the trial court erred in suppressing defendant's post-arrest statements.

Affirmed.

/s/ Stephen L. Borrello /s/ Alton T. Davis /s/ Elizabeth L. Gleicher

Appendix B: Order Denying Leave

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
Raymond Desha DAVIS, Defendant-Appellee.

Docket No. 138225.
COA No. 282886.

May 1, 2009.

Order

On order of the Court, the application for leave to appeal the December 18, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

Defendant was charged with possession of ecstasy, being a felon in possession of a firearm, possession with intent to deliver marijuana, and possession of a firearm during the commission of a felony. The trial court suppressed evidence of defendant's incriminating statement to the police on the ground that he was interrogated without first being advised of his *Miranda* rights after he was arrested, *Miranda v Arizona,* 384 US 436 (1966). The Court of Appeals affirmed. *People v Davis,* unpublished opinion per curiam of the Court of Appeals, issued December 18, 2008 (Docket No. 282886).

While the police were executing a search warrant at a house, defendant jumped out of a bedroom window. He was brought back into the house and asked whether he lived there. Defendant indicated that he was living at the house. After narcotics were found in the house, defendant was arrested and advised of his *Miranda* rights. Defendant again indicated that he lived at the house.

A defendant must be made aware of his *Miranda* rights prior to a custodial interrogation. A "custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Yarborough v Alvarado*, 541 US 652, 661 (2004). "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Id.* at 662. I agree with the trial court that defendant was in custody. He tried to leave the house, the police prevented him from doing so, brought him back into the house, and handcuffed him. A reasonable person in defendant's situation would have believed himself to have been in custody.

I also agree with the trial court that defendant was subjected to interrogation. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980). Here, the police asked defendant if he lived at the house that they had reason to believe contained drugs. Thus, they should have known that they were likely to elicit an incriminating response. Accordingly, the statement made before

defendant was advised of his *Miranda* rights was made during a custodial interrogation, and, thus, would seem to be inadmissible.

The more difficult issue here is whether the *subsequent* statement made *after* defendant was advised of his *Miranda* rights is also inadmissible. In *Missouri v Seibert,* 542 US 600 (2004) (a plurality opinion), the United States Supreme Court held that the police cannot deliberately wait to advise a defendant of his *Miranda* rights until after a station-house interrogation produces a confession and then admit the statement made after *Miranda* rights are given. However, the *Seibert* Court also held that *Oregon v Elstad,* 470 US 298 (1985), remained good law. In *Elstad,* the Court held that if the failure to warn before the initial statement constituted an oversight, and the initial statement was made at the suspect's home and the subsequent statement was made after the suspect was advised of his rights and after a station-house interrogation, the subsequent statement is admissible because "any causal connection between the first and second responses to the police was 'speculative and attenuated.'" *Seibert,* 542 US at 615, quoting *Elstad,* 470 US at 313. The pertinent question is "[c]ould the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?" *Seibert,* 452 US at 612. "Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" *Id.* The Court articulated several factors to evaluate when determining whether "*Miranda* warnings delivered midstream could be effective enough to accomplish their objective: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police

personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

This case is similar to *Elstad* in several important respects—the failure to advise defendant of his *Miranda* rights appears to have been an oversight and the custodial interrogation was not carried out in a station-house environment. However, in other respects, this case is similar to *Seibert*—the questions and answers were the same on two occasions and they occurred relatively closely in time. I would grant leave to appeal.

CORRIGAN, J., joins the statement of MARKMAN, J., and additionally states as follows:

I join Justice Markman's statement insofar as he sees a jurisprudentially significant issue in defendant's post-*Miranda*[1] statement. I would additionally grant leave to appeal on the issue whether the police officer's questions regarding defendant's address truly constituted custodial interrogation under *Rhode Island v Innis,* 446 US 291 (1980), or amounted to routine booking questions.

YOUNG, J., joins the statement of MARKMAN, J.

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[1] *Miranda v Arizona,* 384 US 436 (1966).